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No. 82-15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAY E. OLIVER - - - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Petitioner respectfully replies to certain of the arguments made by the United States, and, in addition, requests this Court to consider the interests expressed by the United States Senate in passing the Immigration Reform and Control Act of 1983, including an amendment requiring that immigration agents obtain search warrants before entering open fields to search for illegal aliens. S. 529, 98th Cong. 1st Sess., 129 Cong. Rec. 6905 et seq., passed May 18, 1983.

I.

The United States suggests the Petitioner has failed to prove that he is entitled to the protection of the Fourth Amendment. The United States argues that "mere" posting and fencing does not give rise to a reasonable expectation of privacy in the farm land owned by the Petitioner. They argue, also, that because the Petitioner leased certain portions of his property—the fields wherein the marijuana was discovered—he cannot claim the protection of the Fourth

Amendment, even though the State Police trespassed a mile and a half into Petitioner's property, and past his home, before reaching these fields. The United States' argument mistakenly places the burden on the Petitioner to demonstrate that the Fourth Amendment protects him from the State Policemen's warrantless actions. It is firmly established that the opposite is true: the *government* bears the burden of establishing that a warrantless search was conducted within the narrow confines of an established exception to the Fourth Amendment. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 455 (1971); [Br. for Pet., p. 12]. (Emphasis added).

The presumption, therefore, is that the Petitioner's farm is entitled to the Fourth Amendment protection provided by the warrant clause. The United States did not, however, explain or describe any exigent circumstances that prevented them from obtaining a warrant to search Petitioner's farm. Simply, they have failed to satisfy their burden, and the search was in violation of the Fourth Amendment.

The totality of the circumstances surrounding the warrantless search of the Petitioner's farm demonstrates that the Petitioner manifested, in many ways, his desire for privacy. The United States has chosen to examine each of these manifestations in isolation in an effort to convince this Court that the Petitioner could not reasonably have expected privacy. Specifically, the United States claims that "No Trespassing" signs do not create a legitimate expectation of privacy in the field, and that fences around the Petitioner's property did not "enhance" a reasonable expectation

of privacy.[1] However, these actions by the Petitioner, combined with the facts that (1) someone shouted at the State Police and requested they leave; (2) the State Police trespassed a mile and a half into Petitioner's secluded farm property and past his home; and (3) the marijuana fields could not be seen by anyone standing on public roads, the Cumberland River, or anywhere not on Petitioner's property, certainly lead to the conclusion that the Petitioner should be entitled to the warrant protection of the Fourth Amendment. The Petitioner's fields were not open fields.[2] This result is particularly required in this case, because the United States *admits* that (1) the State Police did not have probable cause to search the farm, and (2) there were no exigent circumstances which would excuse the lack of a search warrant. [Pet. App., p. 40, f.n. 4].

The United States argues that, because the Petitioner leased certain of his fields to third parties, the State Police were not required to obtain a search warrant before they entered the Petitioner's farm, drove past his home, and walked deep into Petitioner's property *before* discovering the secluded, leased, marijuana fields.[3] This argument is without merit and could deprive property owners around the country of the protections guaranteed by the Fourth Amendment. The argument that a farm owner waives his right to require that government agents obtain a search warrant before searching his entitre secluded farm property because he has leased portions of that farm has obvious constitutional and practical flaws.

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[1]See, Br. for U.S., pp. 17-19.

[2]See, Br. for Pet., pp. 20-24.

[3]See, Br. for U. S., pp. 23-24.

In *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980), this Court determined that the defendant did not have a legitimate expectation of privacy in contraband found by police in another's purse because (1) the defendant had never sought or received access to the purse prior to the bailment, (2) the defendant did not have any right to exclude others from access to the purse, and (3) the defendant did not take normal precautions to maintain his privacy interest. 448 U. S. at 105. In *Rawlings* the Court relied on the holding in *Rakas* v. *Illinois*, 439 U. S. 128 (1978) that the question of standing to assert Fourth Amendment rights is merged into the determination of whether "*governmental officials* violated any legitimate expectation of privacy" held by the defendant. 448 U. S. at 106. (Emphasis added).

It is clear that, according to this standard, the Petitioner exhibited a legitimate expectation of privacy in his farm land, and in the farm land leased to others: the Petitioner, as owner of the farm land, leased the fields where the marijuana was discovered for a period of six months to certain, named, parties. As owner of the fields, and as owner of all of the land surrounding the fields, including the road leading past his home to the area of his farm where the fields were discovered, he retained the right to exclude the public from access to those fields. Finally, the Petitioner took extensive precautions to maintain his privacy interest —as the district court stated: "Short of posting guards at the entrance, it is difficult to see what else the [Petitioner] could have done to assert his privacy interest in his property." [Pet. App., p. 23].

Further, by asserting that, because the Petitioner leased portions of his land, he had no expectation of

privacy because the *lessees* or their *invitees* could enter the farm property, the United States has misinterpreted the standard set forth by this Court in regard to the "exclusion of others". Shortly after this Court's decision in *Katz* v. *United States,* 389 U. S. 347 (1967), Justice Harlan, whose concurring opinion in *Katz* is the lodestar of search and seizure analysis, wrote for the majority in *Mancusi* v. *DeForte,* 392 U. S. 364 (1968). Justice Harlan stated that the capacity to claim the protection of the Fourth Amendment depends "upon whether the area was one in which there was a reasonable expectation of freedom from *governmental intrusion*". 392 U. S. at 368. (Emphasis added). This is the crucial issue, the Justice stated, according to *Katz. Id.* The mere fact that the Petitioner leased a portion of his farm property does not, therefore, prevent him from claiming the protection of the Fourth Amendment, particularly because he had so clearly manifested his desire for protection from warrantless *public* and *governmental intrusion.*

The United States' argument that the lease in this case prevents the Petitioner from claiming Fourth Amendment protection is also contrary to this Court's decisions in *Air Pollution Variance Board* v. *Western Alfalfa,* 416 U. S. 861 (1974), and *Marshall* v. *Barlow's, Inc.,* 436 U. S. 307 (1978). In these cases this Court determined that, without a warrant, a government agent is in no better position than a member of the public, and that a person's Fourth Amendment right has been violated if the warrantless government agent searches or seizes in an area from which the public was excluded. 436 U. S. at 315; 416 U. S. at 865. Since the essence of Fourth Amendment protec-

tion is freedom from warrantless governmental intrusion, and, without a warrant, a government agent stands in no better position than a member of the public, the fact that the Petitioner leased his fields to other, *named* parties does not indicate that members of the general public, or governmental agents, were free to trespass and conduct warrantless searches on Petitioner's farm.

That a lease or other similar agreement does not waive Fourth Amendment protection is made clear by the *Western Alfalfa* and *Marshall* decisions. The defendants in both of these cases were businesses, operating on commercial property. Employees, contractors, and persons leasing buildings or land on the commercial property probably came and went on a daily basis, certainly often without the express authorization or knowledge of the owners of the property. This fact did not prevent this Court from affording these areas Fourth Amendment protection, if the *public* was excluded. 416 U. S. at 865.

The public was similarly excluded from Petitioner's farm, and from the leased fields. Yet, the United States argues that the Petitioner had no expectation of privacy in these areas because he "had no expectation whatsoever that persons unknown to him would not enter these fields at the invitation of the lessees . . ." [Br. for U. S., p. 23]. *Western Alfalfa* and *Marshall* clearly reject this argument for constitutional reasons and for logical reasons as well; a lease to named parties cannot be construed to be the equivalent of an invitation to the entire world, and government agents, to ignore "No Trespassing" signs, a locked gate, verbal

warnings, and other manifestations of the owner's desire to exclude the public.

II.

The United States Senate on May 18, 1983, passed the Immigration Reform and Control Act of 1983, S. 529, by a vote of 76-18. S. 529, 98th Cong., 1st Sess., 129 Cong. Rec. 6969. Idaho Senator James A. McClure, with Senators Symms, Laxalt, Tower, Wilson, Cranston, DeConcini and Domenici proposed an amendment to the Bill, as follows:

> Section 287 of the Immigration and Nationality Act (8 U.S.C. 1357) is amended by adding at the end thereof the following:
>
> "(d) Notwithstanding any other provision of this section, other than paragraph (3) subsection (a), *an officer or employee of the Service may not enter onto the premises of a farm or other agricultural operation without a properly executed warrant.*" Amendment 1279. (Emphasis added).

The amendment passed by a vote of 62-33. The effect of the amendment, if passed by the House of Representatives and signed into law by the President, would be to prohibit warrantless searches of farm operations by INS agents.[4] The amendment was supported by a wide range of groups, whose concerns echo those of the Petitioner and amicus curiae in this case. Among the groups supporting the amendment were the American Farm Bureau, the National Cattlemen's Association, the National Wool Growers Asso-

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[4]The House version of the Bill, H.R. 1510, is currently pending in the House Rules Committee.

ciation, the United Fresh Fruit and Vegetable Growers, and the American Civil Liberties Union.

Sen. McClure explained that the INS currently relies on the open fields doctrine as authority for warrantless, random searches of agricultural operations, in their effort to apprehend illegal alien farm laborers. The Senator stated that:

> There is no question that the fourth amendment protects people, not places; that is exactly the idea that this amendment seeks to reinforce. The objective determination of probable cause by a magistrate—for which all people have guarantees—is not afforded—either to the farmer or the farm workers under the current practice.

129 Cong. Rec. at 6915. The Senator noted the incongruence between the Fourth Amendment protection afforded employees and persons in other businesses, and the lack of Fourth Amendment protection afforded farmers and ranchers in their business. The farm, the Senator stated, "is nothing less than a factory without walls—a business operation that is vital to our Nation's economy." *Id.* Indeed, the Petitioner's farm did have "walls"; the "No Trespassing" signs, the locked gate, the fences, the Cumberland River and thick natural foliage surrounding the property provided barriers to entry and notice to the public to not enter.

Senator Towers, speaking for the amendment, noted that passage of the amendment did not provide any special protection for farmers. It would merely "ensure that farmers, ranchers, and farm workers are afforded the ***same standard of protection against un-***

reasonable and warrantless searches as other businessmen and workers now enjoy." 129 Cong. Rec. at 6936. Senators Symms and Kennedy also spoke for passage. *Id.*, at 6934, 6935.

Passage of the amendment is strong evidence of the national interest in preserving farmers' and property owners' right to be free from unreasonable and warrantless searches by government agents. The Petitioner's case presents an even stronger argument for protection than did the circumstances that prompted the United States Senate to approve the warrant-requirement amendment to the Immigration Reform and Control Act. The Senate was presented with cases in which the INS agents searched open fields after having actually sighted persons they believed to be illegal aliens working in the fields. *Id.*, at 6915. The record in this case demonstrates that the secluded marijuana fields could not be, and were not, seen by the State Police from any point outside Petitioner's property. In fact, the State Police saw marijuana growing in the Petitioner's corn field only after having driven onto his property and past his home and a locked gate, and, in total, travelling a mile and a half into Petitioner's farm property. [Br. for Pet. pp. 4, 5]. The State Police should not be permitted to base such violations of the Fourth Amendment on an unrealistic application of the open fields doctrine, particularly in light of the analysis required by this Court in *Katz*. Under this analysis it is clear that the Petitioner exhibited an actual expectation of privacy, and that this expectation is one that society is prepared to recognize as reasonable. Passage by the United States Senate of Amendment 1279 to the Immigration Reform and

Control Act of 1983 is strong evidence that the Petitioner's expectation of privacy *is* one that society accepts as reasonable.

CONCLUSION

For the reasons hereinabove stated, the Petitioner respectfully requests this Honorable Court to reverse the decision of the Sixth Circuit Court of Appeals which reversed its earlier decision affirming the suppression by the District Court of the evidence obtained in violation of the Fourth Amendment to the United States Constitution.

Respectfully submitted,

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